

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

M. Scott Brener, Commissioner,  
Department of Labor and Industry,  
State of Minnesota,  
vs. Complainant,

**RECOMMENDED ORDER  
GRANTING MOTION FOR  
DEFAULT JUDGMENT**

Bennett Excavation,  
Respondent.

This matter came on before Administrative Law Judge (ALJ) Beverly Jones Heydinger on Complainant's Notice of Motion and Motion for Default Judgment, dated September 18, 2006. A letter from the Administrative Law Judge to the Respondent directed him to respond no later than October 13, 2006. Respondent did not respond to the motion, and the motion record closed on October 13, 2006. After a review of the motion, the ALJ, in a letter dated November 7, 2006, requested additional submissions from the parties on or before November 27, 2006. The ALJ received a written response from the Department and nothing from the Respondent. The motion record closed on November 27, 2006.

Julie A. Leppink, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared for the Department of Labor and Industry (Department). No one responded for Respondent Bennett Excavation and its owner Clint Bennett, 56795 State Highway 19, Winthrop, Minnesota 55396, nor did Respondent contact the Administrative Law Judge to request an extension of this matter.

**NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record and may adopt, reject or modify this recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Based on all the files, records, and proceedings, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDED ORDER**

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Labor and Industry enter an Order affirming the contested citation and notification of penalty against Respondent and granting default judgment in favor of the Department.

Dated this 1st day of December, 2006.

s/Beverly Jones Heydinger  
BEVERLY JONES HEYDINGER  
Administrative Law Judge

### **MEMORANDUM**

#### **I.**

Respondent is an employer engaged in the business of excavation. Respondent's business is located at 450 First Street in Franklin, MN. From June 30, 2005 through July 29, 2005, the Department conducted an occupational safety and health inspection of Respondent's place of employment in accordance with Minn. Stat. § 182.659.<sup>1</sup> As a result of the inspection, the Department found that Respondent was in violation of Minn. Stat. § 182.653. On October 21, 2005, the Commissioner issued a Citation and Notification of Penalty against Respondent for violations of state and federal OSHA regulations found during the inspection. The citation informed Respondent of its right to a hearing to contest the violations in the citation via a Notice of Contest, which must be filed with the Commissioner within 20 calendar days of receiving the citation.

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<sup>1</sup> Affidavit of Julie A. Leppink, Ex. B ("Amended Complaint").

On November 11, 2005, Respondent filed a Notice of Contest challenging the citation and penalties.<sup>2</sup> In the Notice of Contest, Respondent challenged items 2a, 3, and 4 of Item 1. These items concern Respondent's alleged failure to provide training to his workers on the hazards of excavation activities; failure to keep excavated soil back two feet from the edge of the excavation; and failure to adequately slope an excavation so as to protect it from cave-ins, which resulted in a fatal injury to one of his workers on June 29, 2005. All three violations were deemed serious and the Department proposed penalties in an amount totaling \$27,450.00. Respondent did not contest items 1 and 2b, which related to failure to have a written Workplace Accident and Injury Reduction (AWAIR) Program to address the hazards of excavation work and failure to have the work site inspected daily by a competent person. These violations were also categorized as serious, but neither had a penalty assigned to them.

On February 3, 2006, the Department served a Summons and Complaint on the Respondent by mail.<sup>3</sup> The Summons informed Respondent that he was required to serve an Answer to the Complaint on the Commissioner within 20 days after service of the Summons, in which he would either admit or deny each allegation in the Complaint. Respondent was further informed that his failure to file an Answer might constitute a waiver of Respondent's right to further participation in this proceeding. Respondent did not file an Answer to the Complaint.

On June 15, 2006, the Department served a Summons and Amended Complaint on the Respondent by mail because the Commissioner had changed the penalty invoice issued to Respondent to reflect that Respondent, as a small employer, was qualified to pay the \$25,000 penalty in \$5,000 installments over a five year period.<sup>4</sup> To date, Respondent has not filed an Answer to either Complaint.

## II.

The Department's motion for default judgment is based on Minn. R. 5210.0570, subps. 4 and 5. Subpart 4 states as follows:

Within 20 days after service of the complaint, the party . . . against whom the complaint was issued shall file with the commissioner an answer and serve the answer on every other party.  
The answer must contain a short and plain statement denying those allegations in the complaint that the party intends to contest and assert any and all affirmative defenses. Any allegation not denied is deemed admitted and any affirmative defense not asserted is deemed waived.

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<sup>2</sup> The Department included a copy of the Notice of Contest in its supplemental submissions. The Notice of Contest was filed one day late, but the Department acted upon it as if it were filed timely.

<sup>3</sup> See Department's letter and supplemental submissions dated November 9, 2006.

<sup>4</sup> Affidavit of Julie A. Leppink, Ex. C. The Amended Complaint also notified Respondent that he qualified for a waiver of the penalty in years two through five provided Respondent was not cited for additional OSHA violations.

If the respondent fails to file a timely answer, subpart 5 permits the administrative law judge, upon motion by a party, to enter an order affirming the contested citation and notification of penalty. The Department argues that Respondent's failure to file an answer to the complaint is grounds for default judgment under Minn. R. 5210.0570, subp. 5.<sup>5</sup>

### III.

Respondent has not filed an answer, timely or untimely, to the Complaint dated February 3, 2006, or the Amended Complaint dated June 15, 2006. Because the Respondent did not file an Answer, the Department argues that the allegations contained in the Complaint are deemed admitted and any affirmative defenses are deemed waived. As a result, the Department filed a motion with the ALJ under Minn. R. 5210.0570, subp. 5, to enter an order affirming the contested citation and notification of penalty.

Respondent violated 29 C.F.R. § 1926.21(b)(2) as described in Citation 1, Item 2a; 29 C.F.R. § 1926.651(j)(2) as described in Citation 1, Item 3; and 29 C.F.R. § 1926.652(a)(1) as described in Citation 1, Item 4. Each of these violations was properly classified as a serious violation under Minn. Stat. § 182.651, subd. 12. The proposed penalty for each violation was issued properly pursuant to Minn. Stat. § 182.661, subd. 1, and the amount of the penalty is appropriate and reflects consideration of the employer's size, the employer's good faith, the employer's violation history, and the gravity of the violation alleged, as required by Minn. Stat. § 182.666, subd. 6. Respondent did not contest Citation 1, Items 1 and 2b.

Accordingly, the ALJ recommends that Respondent's contested citation and notification of penalty be affirmed and that default judgment be granted in favor of the Department.

**B. J. H.**

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<sup>5</sup> The Department's brief provides a citation to Minn. R. 5210.0595, subp. 5, which does not exist. The administrative law judge assumes that the Department meant to reference subpart 5 of part 5210.0570.